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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 347

WILLMARK SERVICE SYSTEM, INC.,

Petitioner,

W. WILLARD WIRTZ, Secretary of Labor,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

CLARENCE FRIED, Esq.,
Attorney for Petitioner,
67 Wall Street,
New York 5, New York.

HAWKINS, DELAFIELD & WOOD,
CLARENCE FRIED,
JOSEPH A. MCCUE,
Of Counsel.

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W. Willard Wirtz, Secretary of Labor,

Respondent.

PETITIONER'S REPLY BRIEF

Introduction

Petitioner pursuant to the rules of this Court, will not reargue points covered in its original petition or present authorities adequately discussed therein, but will confine the argument herein to the respondent's failure to meet the issues presented by the petition.

Argument

The predicates of petitioner's application herein are that (a) the work of Willmark's employees and the services rendered by them do not in any way affect, aid, hinder, detract from or assist the movement of goods in interstate commerce and (b) collaterally that the petitioner should be considered as a retailer since the services rendered by its employees are consumed by the organizations employing

Willmark's services. Respondent does not meet the challenge of the petition but instead relies upon general conclusions drawn from various cases without squarely answering the contentions of the petitioner in support of this application.

In reviewing the respondent's brief, it will be noted that he avoids rather than answers the contentions of the petitioner, as is obvious from the following analysis of respondent's brief in the order in which the subjects are discussed.

1. Coverage

A. The respondent has cited the case of *Western Union v. Lenroot*, 323 U. S. 490 (Respondent's Brief, 8, 9), in support of his contention that the preparation of Willmark's reports constitutes the production of goods for commerce under the applicable provisions of the Fair Labor Standards Act. The factual situation in *Western Union, supra*, is clearly distinguishable. While this Court held that telegraphic messages were goods within the meaning of the Act, it is obvious that Western Union's entire business is the transmittal of messages throughout the various states. Willmark's business is concerned, however, primarily with the rendition of services and it is only incidental to such services that reports in some cases are prepared. An organization which has as its basic business purpose the transmission of messages and whose employees send messages into interstate channels cannot be validly compared to the factual situation presented by Willmark's service orientated business.

The respondent has cited three cases[1] (Respondent's Brief, 9) which concededly did not arise under the Act but

[1] *North American Co. v. S.E.C.*, 327 U. S. 686;
Associated Press v. National Labor Relations Board, 301 U. S. 103;
International Text Book Co. v. Pigg, 217 U. S. 91.

nevertheless the respondent continues to place reliance on their application to the "in commerce" provision of the Fair Labor Standards Act. Respondent argues that the above cases are "pertinent" (Respondent's Brief, 8), but neglects to mention that this Court has always held that it is not the employer's activities but rather those of the employees that are to be judiciously appraised. The common denominator which petitioner postuates as goods "affected or touched" (Pet. 21) cannot be dismissed by the application of the factual situation in the *Joyce*[2] case wherein the employees performed their duties in a wholesale warehouse which was a terminal used for interstate shipment (Pet. 19). This Court in deciding the *Joyce* case, presumably because of its citation of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Phillips Co.* v. *Walling*, 324 U. S. 490, placed proper emphasis on the interstate character of the situs of the place of employment and the inescapable manner in which the *Joyce* employees "affected or touched" the goods in transit. The respondent as an aside to his argument, utilizing the *Joyce* result with an unqualified interpretation of the facts, begs the question by assuming without analysis that the petitioner is engaged in interstate commerce.

Respondent has cited the case of *Powell* v. *U. S. Cartridge Co.*,[3] 339 U. S. 497 (Respondent's Brief, p. 9) for the proposition that the Willmark shoppers feigned purchase of their customers' merchandise constitutes the production of goods in interstate commerce for use, consump-

[2] *Mitchell* v. *Joyce Agency, Inc.*, 211 F. 2d 241 reversed, 348 U. S. 945.

[3] The *Powell* case dealt with employees of a private contractor operating a government munitions plant, wherein it was held that these employees were not employed by the United States and that the production of munitions and their intended shipment for consumption was within the commerce definition of the Fair Labor Standards Act.

tion, sale or exchange. It would lead us far from Congressional intent if this Court were persuaded to consider this involvement with their customers' goods as the type of activity envisioned by Congress. Respondent assumes without question that the Willmark employees are engaged in the production of goods and blandly adds that this transaction involves use, consumption, sale or exchange of goods in interstate commerce whereas, in fact, the merchandise is owned by the customer and possession of the goods (without a bona fide transfer of title) is acquired only as an incident to Willmark's service. In fact, the entire transaction is a fictitious sale and is merely an incident to Willmark's investigative study. Title and control of the customers' merchandise never passes to Willmark and the result of the transaction is nothing more than the return to the customer of his own goods. To characterize this transaction in respondent's terms is utterly unrealistic and would stretch the intended liberality of this Act to an unmeasured degree without reasonable or logical limits.

Respondent argues that petitioner's statement (Pet. 9) "that the shoppers and supervisors perform work of a concededly local nature within one state" is contrary to the Record. We direct this Court's attention to the memorandum decision of the District Court found at page 14 of the Record (Pet. 9), wherein the Court confined the question of coverage to employees in the State of Minnesota. While there may have been some question even as to the coverage of employees whose activities take them beyond the boundaries of more than one state, petitioner did concede coverage in this litigation as to such employees. But it cannot be denied that the sole question before the District Court was limited to shoppers performing services within the State of Minnesota.

The *Kirschbaum*, *Vallmer*, *Lublin*, *Joyce* and *Kroger* cases cited by the respondent at pages 8-10 and 12 of his brief, have been adequately treated in the petition (20, 5-7, 12) and shall not be re-argued here. It should be

noted, however, that the respondent has met petitioner's arguments with only passing innuendos which casually press results rather than reasons upon this Court. Clearly the above-mentioned cases do not lead us down the unilateral path which the respondent outlines.

B. Petitioner agrees with the respondent, that the 1961 Amendments to the Fair Labor Standards Act have broadened the basic coverage provision (Pet. 10), but the respondent misinterprets this fact to mean that the legislative history of these Amendments is of no help to petitioner and can present no assistance to this Court. It is petitioner's contention that even under the 1961 provisions Willmark's employees would not be covered by the Act and since the question of coverage is before this Court, the legislative history of the 1961 Amendments cannot be relegated to a position of impotence by the respondent's sanctioning of the irrelevant. Respondent's conclusory retort (Respondent's Brief, 11) would lead this Court to believe that coverage, prior to 1961, was fully established and that because the Amendments did not curtail such coverage they are of no avail. Again, the respondent has avoided petitioner's argument by utilization of faulty premises. The 1961 legislative materials review the provisions of the Fair Labor Standards Act both before and after the Amendments, and since they discuss the entire aspects of coverage and exemption under the Act, they should be reviewed by this Court as they will readily demonstrate Congress continued to reject the test that the transaction of business in more than one state is in and of itself a sufficient test for determining whether a business is engaged in interstate commerce. By the same token, Willmark is not an enterprise which has purchased or received goods for resale that move or have moved across state lines.

C. A discussion of the conflicts among the various Courts of Appeals has been adequately covered in the petition (Pet. 12-18). Respondent has attempted to dis-

miss petitioner's arguments as if without merit, but utterly failed to offer any substantial basis for such summary treatment and therefore makes unnecessary further discussion or repetition of arguments advanced in the original petition.

2. Exemption

The case of *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, is cited by the respondent (Respondent's Brief, pp. 7, 12, 13) for the proposition that Willmark is not "a retail or service establishment" within the meaning of Section 13(a)(2) of the Act, and the petitioner has presented its review of that decision (Pet. 21-22) so as to preclude further argument.

It is correctly stated by the respondent (Respondent's Brief, 12) that this Court has held that the exemption issue is to be narrowly construed against employers. The respondent, however, attempts to utilize this holding as a broad weapon against all exemptions regardless of the evidence adduced. Even under the narrow construction doctrine the Secretary is not the final arbiter of what exemptions are readily apparent within the meaning of Section 13(a)(2) and this Court should not encourage an evidentiary doctrine of unanimity strikingly akin to a position which would allow an exemption only if established beyond any reasonable doubt. Unfortunately, the lower courts have succumbed to the Secretary's insistence and have formalized the exemption issue into a doctrine of law unsupported by the legislative intent. The burden of proof requirement has thus entered a realm in which no evidence will rebut the "*per se*" character of this section as read by the Secretary.

The Government has cited the case of *Telephone Answering Service, Inc.* v. *Goldberg*, 290 F. 2d 529 (C. A. 1), in support of its argument that the petitioner is, as a matter of law, not within the scope of Section 13(a)(2) of the

Act. In the course of defendant's business, telephone operators were employed to answer various subscribers' calls. Three of the defendant's subscribers were airlines engaged in both foreign and interstate commerce. The telephone operators, in servicing these airlines, give information to both individuals and travel bureaus on such matters as flight arrival and departure time, seating availability, flight numbers, airline schedules and numerous other subjects. While this information was given only after the airline offices were closed for the day, it in effect transformed these operators into quasi employees of the airlines. The defendant's employees were so closely involved in the airline operations as to be clearly engaged "in commerce". The District Court held that the defendant's employees were engaged in commerce, and also found that the defendant's business was not an exempt organization but recognized that the latter question was a factual one to be determined by the weight of the evidence. It must be noted, however, that the Court of Appeals in affirming, *supra*, page 534, recognized the validity of another District Court decision,[4] which upheld an exemption for another telephone answering service, thus disposing of the notion that the defendant would not have been entitled to an exemption if he satisfied his burden of proof on that issue. The activities of Willmark's employees are not even remotely analogous to these telephone operators since the duties of the former never involved them in the actual operation of their customer's interstate business.

In *Willmark*, however, it is petitioner's contention that the decisions below were rendered without giving proper weight to the testimony elicited and have thus failed to fulfill the intended interpretation of Section 13(a)(2). The courts below have attempted to legislate the defining evidentiary degree to be satisfied under Section 13(a)(2)

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[4] *Mahoney* v. *Mahoney*, 186 F. Supp. 633 (D. C. Tenn. 1960).

and surely this endeavor unreasonably enlarges the "open spaces" which Justice Cardozo asserted was properly a judicial prerogative.[5] The exemption question necessitates a deductive study by this Court, whereas the respondent raises inductive reasoning to interpret Section 13(a)(2) in his effort to characterize Willmark's business as unmistakenly unentitled to an exemption—clearly the Secretary's interpolations are not so obvious.

Willmark is a retail service organization, recognized as such in the retail industry, and having satisfied a proper burden of proof should not be denied an exemption under Section 13(a)(2) of the Fair Labor Standards Act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLARENCE FRIED,
Counsel for Petitioner.

HAWKINS, DELAFIELD & WOOD,
CLARENCE FRIED,
JOSEPH A. MCCUE,
Of Counsel.

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[5] *The Nature of the Judicial Process*, Yale University Press (1921), page 113.